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AMENDMENTS TO THE FEDERAL RULES OF APPELLATE PROCEDURE

COMMUNICATION

FROM

THE CHIEF JUSTICE OF THE UNITED STATES

TRANSMITTING

AMENDMENTS TO THE FEDERAL RULES OF APPELLATE PROCEDURE WHICH HAVE BEEN ADOPTED BY THE SUPREME COURT, PURSUANT TO 28 U.S.C. 2072

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Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

March 10, 1986

Dear Mr. Speaker:

By direction of the Supreme Court of the United States, I have the honor to submit to the Congress amendments to the Federal Rules of Appellate Procedure which have been adopted by the Supreme Court pursuant to Title 18, United States Code, Section 3772, and Title 28, United States Code, Section 2072.

Accompanying these rules is an excerpt from the report of the Judicial Conference of the United States containing the Advisory Committee notes submitted to the Court for its consideration pursuant to Title 28, United States Code, Section 331.

Respectfully,

Warren E. Burger

Honorable Thomas P. O'Neill, Jr.
Speaker of the House of Representatives
Washington, D. C. 20515

SUPREME COURT OF THE UNITED STATES

March 10, 1986

ORDERED:

1. That the Federal Rules of Appellate Procedure be, and they hereby are, amended by including therein new Appellate Rules 3.I, 5.1 and 15.1 and amendments to Appellate Rules 3(d), 8(b), 10(b) and (c), 11(b), 12(a), 19, 23(b) and (c), 24(a), 25(a) and (b), 26(a) and (c), 28(c) and (j), 30(a), (b) and (c), 31(a) and (c), 34(a) and (e), 39(c) and (d), 43(a) and (c), 45(a), (b), and (d), and 46(a) and (b), as hereinafter set forth:

[See infra., pp._____ _____ _____.]

2. That the foregoing additions to and changes in the Federal Rules of Appellate Procedure, shall take effect on July 1, 1986 and shall govern all proceedings in appellate actions thereafter commenced and, insofar as just and practicable, all proceedings in appellate actions then pending.

3. That THE CHIEF JUSTICE be, and he hereby is, authorized to transmit to the Congress the foregoing additions to and changes in the rules of appellate procedure in accordance with the provisions of Section 3772 of Title 18 and Section 2072 of Title 28, United States Code.

AMENDMENTS TO THE FEDERAL RULES OF APPELLATE PROCEDURE

Rule 3. Appeal as of Right - How Taken

* * * * *

(d) Service of the Notice of Appeal. The clerk of the district court shall serve notice of the filing of a notice of appeal by mailing a copy thereof to counsel of record of each party other than the appellant, or, if a party is not represented by counsel, to the last known address of that party; and the clerk shall transmit forthwith a copy of the notice of appeal and of the docket entries to the clerk of the court of appeals named in the notice. When an appeal is taken by a defendant in a criminal case, the clerk shall also serve a copy of the notice of appeal upon the defendant, either by personal service or by mail addressed to the defendant. The clerk shall note on each copy served the date on which the notice of appeal was filed. Failure of the clerk to serve notice shall not affect the validity of the appeal. Service shall be sufficient notwithstanding the death of a party or the party's counsel. The clerk shall note in the docket the names of the parties to whom the clerk mails copies, with the date of mailing.

* * * * *

FEDERAL RULES OF APPELLATE PROCEDURE

Rule 3.1. Appeals from Judgments Entered by Magistrates in Civil Cases

When the parties consent to a trial before a magistrate pursuant to 28 U.S.C. § 636(c)(1), an appeal from a judgment entered upon the direction of a magistrate shall be heard by the court of appeals pursuant to 28 U.S.C. § 636(c)(3), unless the parties, in accordance with 28 U.S.C. § 636(c)(4), consent to an appeal on the record to a judge of the district court and thereafter, by petition only, to the court of appeals. Appeals to the court of appeals pursuant to 28 U.S.C. § 636 (c)(3) shall be taken in identical fashion as appeals from other judgments of the district court.

Rule 5.1. Appeals by Permission Under 28 U.S.C. § 636(c) (5)

(a) Petition for Leave to Appeal; Answer or Cross Petition. An appeal from a district court judgment, entered after an appeal pursuant to 28 U.S.C. § 636(c)(4) to a judge of the district court from a judgment entered upon direction of a magistrate in a civil case, may be sought by filing a petition for leave to appeal. An appeal on petition for leave to appeal is not a matter of right, but its allowance is a matter of sound judicial discretion. The petition shall be filed with the clerk of the court of appeals within the time provided by Rule 4(a) for filing a notice of appeal, with proof of service on all parties to the action in the district court. A notice of

appeal need not be filed. Within 14 days after service of the petition, a party may file an answer in opposition or a cross petition.

(b) Content of Petition; Answer. The petition for leave to appeal shall contain a statement of the facts necessary to an understanding of the questions to be presented by the appeal; a statement of those questions and of the relief sought; a statement of the reasons why in the opinion of the petitioner the appeal should be allowed; and a copy of the order, decree or judgment complained of and any opinion or memorandum relating thereto. The petition and answer shall be submitted to a panel of judges of the court of appeals without oral argument unless otherwise ordered.

(c) Form of Papers; Number of Copies. All papers may be typewritten. Three copies shall be filed with the original, but the court may require that additional copies be furnished.

(d) Allowance of the Appeal; Fees; Cost Bond; Filing of Record. Within 10 days after the entry of an order granting the appeal, the appellant shall (1) pay to the clerk of the district court the fees established by statute and the docket fee prescribed by the Judicial Conference of the United States and (2) file a bond for costs if required pursuant to Rule 7. The clerk of the district court shall notify the clerk of the court of appeals of the payment of the fees. Upon receipt of such notice, the clerk of the court of appeals shall enter the appeal upon the docket. The record shall be transmitted and filed in accordance with Rules 11 and 12(b).

Rule 8. Stay or Injunction Pending Appeal

* * * * *

(b) Stay May Be Conditioned Upon Giving of Bond; Proceedings Against Sureties. Relief available in the court of appeals under this rule may be conditioned upon the filing of a bond or other appropriate security in the district court. If security is given in the form of a bond or stipulation or other undertaking with one or more sureties, each surety submits to the jurisdiction of the district court and irrevocably appoints the clerk of the district court as the surety's agent upon whom any papers affecting the surety's liability on the bond or undertaking may be served. A surety's liability may be enforced on motion in the district court without the necessity of an independent action. The motion and such notice of the motion as the district court prescribes may be served on the clerk of the district court, who shall forthwith mail copies to the sureties if their addresses are known.

* * * * *

Rule 10. The Record on Appeal

* * * * *

(b) The Transcript of Proceedings; Duty of Appellant to Order; Notice to Appellee if Partial Transcript is Ordered.

(1) Within 10 days after filing the notice of appeal the appellant shall order from the reporter a transcript of such parts of

the proceedings not already on file as the appellant deems necessary, subject to local rules of the courts of appeals. The order shall be in writing and within the same period a copy shall be filed with the clerk of the district court. If funding is to come from the United States under the Criminal Justice Act, the order shall so state. If no such parts of the proceedings are to be ordered, within the same period the appellant shall file a certificate to that effect.

(2) If the appellant intends to urge on appeal that a finding or conclusion is unsupported by the evidence or is contrary to the evidence, the appellant shall include in the record a transcript of all evidence relevant to such finding or conclusion.

(3) Unless the entire transcript is to be included, the appellant shall, within the 10 days time provided in (b)(1) of this Rule 10, file a statement of the issues the appellant intends to present on the appeal and shall serve on the appellee a copy of the order or certificate and of the statement. If the appellee deems a transcript or other parts of the proceedings to be necessary, the appellee shall, within 10 days after the service of the order or certificate and the statement of the appellant, file and serve on the appellant a designation of additional parts to be included. Unless within 10 days after service of such designation the appellant has ordered such parts, and has so notified the appellee, the appellee may within the following 10 days either order the parts or move in the district court for an order requiring the appellant to do so.

(4) At the time of ordering, a party must make satisfactory arrangements with the reporter for payment of the cost of the transcript.

(c) Statement on the Evidence or Proceedings When No Report Was Made or When the Transcript is Unavailable. If no report of the evidence or proceedings at a hearing or trial was made, or if a transcript is unavailable, the appellant may prepare a statement of the evidence or proceedings from the best available means, including the appellant's recollection. The statement shall be served on the appellee, who may serve objections or proposed amendments thereto within 10 days after service. Thereupon the statement and any objections or proposed amendments shall be submitted to the district court for settlement and approval and as settled and approved shall be included by the clerk of the district court in the record on appeal.

* * * * *

Rule 11. Transmission of the Record

* * * * *

(b) Duty of Reporter to Prepare and File Transcript; Notice to Court of Appeals; Duty of Clerk to Transmit the Record. Upon receipt of an order for a transcript, the reporter shall acknowledge at the foot of the order the fact that the reporter has received it and the date on which the reporter expects to have the transcript completed and shall transmit the order, so endorsed, to the clerk of

the court of appeals. If the transcript cannot be completed within 30 days of receipt of the order the reporter shall request an extension of time from the clerk of the court of appeals and the action of the clerk of the court of appeals shall be entered on the docket and the parties notified. In the event of the failure of the reporter to file the transcript within the time allowed, the clerk of the court of appeals shall notify the district judge and take such other steps as may be directed by the court of appeals. Upon completion of the transcript the reporter shall file it with the clerk of the district court and shall notify the clerk of the court of appeals that the reporter has done so.

When the record is complete for purposes of the appeal, the clerk of the district court shall transmit it forthwith to the clerk of the court of appeals. The clerk of the district court shall number the documents comprising the record and shall transmit with the record a list of documents correspondingly numbered and identified with reasonable definiteness. Documents of unusual bulk or weight, physical exhibits other than documents, and such other parts of the record as the court of appeals may designate by local rule, shall not be transmitted by the clerk unless the clerk is directed to do so by a party or by the clerk of the court of appeals. A party must make advance arrangements with the clerks for the transportation and receipt of exhibits of unusual bulk or weight.

* * * * *

Rule 12. Docketing the Appeal; Filing of the Record

(a) Docketing the Appeal. Upon receipt of the copy of the notice of appeal and of the docket entries, transmitted by the clerk of the district court pursuant to Rule 3(d), the clerk of the court of appeals shall thereupon enter the appeal upon the docket. An appeal shall be docketed under the title given to the action in the district court, with the appellant identified as such, but if such title does not contain the name of the appellant, the appellant's name, identified as appellant, shall be added to the title.

* * * * *

Rule 15.1. Briefs and Oral Argument in National Labor Relations Board Proceedings

Each party adverse to the National Labor Relations Board in an enforcement or a review proceeding shall proceed first on briefing and at oral argument unless the court orders otherwise.

Rule 19. Settlement of Judgments Enforcing Orders

When an opinion of the court is filed directing the entry of a judgment enforcing in part the order of an agency, the agency shall within 14 days thereafter serve upon the respondent and file with the clerk a proposed judgment in conformity with the opinion. If the respondent objects to the proposed judgment as not in conformity with the opinion, the respondent shall within 7 days thereafter serve upon the agency and file with the clerk a proposed judgment which

the respondent deems to be in conformity with the opinion. The court will thereupon settle the judgment and direct its entry without further hearing or argument.

Rule 23. Custody of Prisoners in Habeas Corpus Proceedings

* * * * *

(b) Detention or Release of Prisoner Pending Review of Decision Failing to Release. Pending review of a decision failing or refusing to release a prisoner in such a proceeding, the prisoner may be detained in the custody from which release is sought, or in other appropriate custody, or may be enlarged upon the prisoner's recognizance, with or without surety, as may appear fitting to the court or justice or judge rendering the decision, or to the court of appeals or to the Supreme Court, or to a judge or justice of either court.

(c) Release of Prisoner Pending Review of Decision Ordering Release. Pending review of a decision ordering the release of a prisoner in such a proceeding, the prisoner shall be enlarged upon the prisoner's recognizance, with or without surety, unless the court or justice or judge rendering the decision, or the court of appeals or the Supreme Court, or a judge or justice of either court shall otherwise order.

* * * * *

Rule 24. Proceedings in Forma Pauperis

(a) Leave to Proceed on Appeal in Forma Pauperis from District Court to Court of Appeals. A party to an action in a district court who desires to proceed on appeal in forma pauperis shall file in the district court a motion for leave so to proceed, together with an affidavit, showing, in the detail prescribed by Form 4 of the Appendix of Forms, the party's inability to pay fees and costs or to give security therefor, the party's belief that that party is entitled to redress, and a statement of the issues which that party intends to present on appeal. If the motion is granted, the party may proceed without further application to the court of appeals and without prepayment of fees or costs in either court or the giving of security therefor. If the motion is denied, the district court shall state in writing the reasons for the denial.

Notwithstanding the provisions of the preceding paragraph, a party who has been permitted to proceed in an action in the district court in forma pauperis, or who has been permitted to proceed there as one who is financially unable to obtain adequate defense in a criminal case, may proceed on appeal in forma pauperis without further authorization unless, before or after the notice of appeal is filed, the district court shall certify that the appeal is not taken in good faith or shall find that the party is otherwise not entitled so to proceed, in which event the district court shall state in writing the reasons for such certification or finding.

If a motion for leave to proceed on appeal in forma pauperis is denied by the district court, or if the district court shall certify that the appeal is not taken in good faith or shall find that the party is otherwise not entitled to proceed in forma pauperis, the clerk shall forthwith serve notice of such action. A motion for leave so to proceed may be filed in the court of appeals within 30 days after service of notice of the action of the district court. The motion shall be accompanied by a copy of the affidavit filed in the district court, or by the affidavit prescribed by the first paragraph of this subdivision if no affidavit has been filed in the district court, and by a copy of the statement of reasons given by the district court for its action.

* * * * *

Rule 25. Filing and Service

(a) Filing. Papers required or permitted to be filed in a court of appeals shall be filed with the clerk. Filing may be accomplished by mail addressed to the clerk, but filing shall not be timely unless the papers are received by the clerk within the time fixed for filing, except that briefs and appendices shall be deemed filed on the day of mailing if the most expeditious form of delivery by mail, excepting special delivery, is utilized. If a motion requests relief which may be granted by a single judge, the judge may permit the motion to be filed with the judge, in which event the judge shall note

thereon the date of filing and shall thereafter transmit it to the clerk.

(b) Service of All Papers Required. Copies of all papers filed by any party and not required by these rules to be served by the clerk shall, at or before the time of filing, be served by a party or person acting for that party on all other parties to the appeal or review. Service on a party represented by counsel shall be made on counsel.

* * * * *

Rule 26. Computation and Extension of Time

(a) Computation of Time. In computing any period of time prescribed by these rules, by an order of court, or by any applicable statute, the day of the act, event, or default from which the designated period of time begins to run shall not be included. The last day of the period shall be included, unless it is a Saturday, a Sunday, or a legal holiday, in which event the period extends until the end of the next day which is not a Saturday, a Sunday, or a legal holiday. When the period of time prescribed or allowed is less than 7 days, intermediate Saturdays, Sundays, and legal holidays shall be excluded in the computation. As used in this rule "legal holiday" includes New Year's Day, Birthday of Martin Luther King, Jr., Washington's Birthday, Memorial Day, Independence Day, Labor Day, Columbus Day, Veterans Day, Thanksgiving Day, Christmas Day, and any other day appointed as a holiday by the President or the Congress of the United States. It shall also include a day appointed

as a holiday by the state wherein the district court which rendered the judgment or order which is or may be appealed from is situated, or by the state wherein the principal office of the clerk of the court of appeals in which the appeal is pending is located.

* * * * *

(c) Additional Time After Service by Mail. Whenever a party is required or permitted to do an act within a prescribed period after service of a paper upon that party and the paper is served by mail, 3 days shall be added to the prescribed period.

Rule 28. Briefs

* * * * *

(c) Reply Brief. The appellant may file a brief in reply to the brief of the appellee, and if the appellee has cross-appealed, the appellee may file a brief in reply to the response of the appellant to the issues presented by the cross appeal. No further briefs may be filed except with leave of court. All reply briefs shall contain a table of contents, with page references, and a table of cases (alphabetically arranged), statutes and other authorities cited, with references to the pages of the reply brief where they are cited.

* * * * *

(j) Citation of Supplemental Authorities. When pertinent and significant authorities come to the attention of a party after the party's brief has been filed, or after oral argument but before decision, a party may promptly advise the clerk of the court, by

letter, with a copy to all counsel, setting forth the citations. There shall be a reference either to the page of the brief or to a point argued orally to which the citations pertain, but the letter shall without argument state the reasons for the supplemental citations. Any response shall be made promptly and shall be similarly limited.

Rule 30. Appendix to the Briefs

(a) Duty of Appellant To Prepare and File; Content of Appendix; Time for Filing; Number of Copies. The appellant shall prepare and file an appendix to the briefs which shall contain: (1) the relevant docket entries in the proceeding below; (2) any relevant portions of the pleadings, charge, findings or opinion; (3) the judgment, order or decision in question; and (4) any other parts of the record to which the parties wish to direct the particular attention of the court. Except where they have independent relevance, memoranda of law in the district court should not be included in the appendix. The fact that parts of the record are not included in the appendix shall not prevent the parties or the court from relying on such parts.

Unless filing is to be deferred pursuant to the provisions of subdivision (c) of this rule, the appellant shall serve and file the appendix with the brief. Ten copies of the appendix shall be filed with the clerk, and one copy shall be served on counsel for each party separately represented, unless the court shall by rule or order direct the filing or service of a lesser number.

(b) Determination of Contents of Appendix; Cost of Producing. The parties are encouraged to agree as to the contents of the appendix. In the absence of agreement, the appellant shall, not later than 10 days after the date on which the record is filed, serve on the appellee a designation of the parts of the record which the appellant intends to include in the appendix and a statement of the issues which the appellant intends to present for review. If the appellee deems it necessary to direct the particular attention of the court to parts of the record not designated by the appellant, the appellee shall, within 10 days after receipt of the designation, serve upon the appellant a designation of those parts. The appellant shall include in the appendix the parts thus designated. In designating parts of the record for inclusion in the appendix, the parties shall have regard for the fact that the entire record is always available to the court for reference and examination and shall not engage in unnecessary designation.

Unless the parties otherwise agree, the cost of producing the appendix shall initially be paid by the appellant, but if the appellant considers that parts of the record designated by the appellee for inclusion are unnecessary for the determination of the issues presented the appellant may so advise the appellee and the appellee shall advance the cost of including such parts. The cost of producing the appendix shall be taxed as costs in the case, but if either party shall cause matters to be included in the appendix unnecessarily the court may impose the cost of producing such parts on the party.

Each circuit shall provide by local rule for the imposition of sanctions against attorneys who unreasonably and vexatiously increase the costs of litigation through the inclusion of unnecessary material in the appendix.

(c) Alternative Method of Designating Contents of the Appendix; How References to the Record May be Made in the Briefs When Alternative Method is Used. If the court shall so provide by rule for classes of cases or by order in specific cases, preparation of the appendix may be deferred until after the briefs have been filed, and the appendix may be filed 21 days after service of the brief of the appellee. If the preparation and filing of the appendix is thus deferred, the provisions of subdivision (b) of this Rule 30 shall apply, except that the designations referred to therein shall be made by each party at the time each brief is served, and a statement of the issues presented shall be unnecessary.

If the deferred appendix authorized by this subdivision is employed, references in the briefs to the record may be to the pages of the parts of the record involved, in which event the original paging of each part of the record shall be indicated in the appendix by placing in brackets the number of each page at the place in the appendix where that page begins. Or if a party desires to refer in a brief directly to pages of the appendix, that party may serve and file typewritten or page proof copies of the brief within the time required by Rule 31(a), with appropriate references to the pages of the parts of the record involved. In that event, within 14 days after

the appendix is filed the party shall serve and file copies of the brief in the form prescribed by Rule 32(a) containing references to the pages of the appendix in place of or in addition to the initial references to the pages of the parts of the record involved. No other changes may be made in the brief as initially served and filed, except that typographical errors may be corrected.

* * * * *

Rule 31. Filing and Service of Briefs

(a) Time for Serving and Filing Briefs. The appellant shall serve and file a brief within 40 days after the date on which the record is filed. The appellee shall serve and file a brief within 30 days after service of the brief of the appellant. The appellant may serve and file a reply brief within 14 days after service of the brief of the appellee, but, except for good cause shown, a reply brief must be filed at least 3 days before argument. If a court of appeals is prepared to consider cases on the merits promptly after briefs are filed, and its practice is to do so, it may shorten the periods prescribed above for serving and filing briefs, either by rule for all cases or for classes of cases, or by order for specific cases.

* * * * *

(c) Consequence of Failure to File Briefs. If an appellant fails to file a brief within the time provided by this rule, or within the time as extended, an appellee may move for dismissal of the

appeal. If an appellee fails to file a brief, the appellee will not be heard at oral argument except by permission of the court.

Rule 34. Oral Argument

(a) In General; Local Rule. Oral argument shall be allowed in all cases unless pursuant to local rule a panel of three judges, after examination of the briefs and record, shall be unanimously of the opinion that oral argument is not needed. Any such local rule shall provide any party with an opportunity to file a statement setting forth the reasons why oral argument should be heard. A general statement of the criteria employed in the administration of such local rule shall be published in or with the rule and such criteria shall conform substantially to the following minimum standard:

Oral Argument will be allowed unless

(1) the appeal is frivolous; or

(2) the dispositive issue or set of issues has been recently authoritatively decided; or

(3) the facts and legal arguments are adequately presented in the briefs and record and the decisional process would not be significantly aided by oral argument.

* * * * *

(e) Non-Appearance of Parties. If the appellee fails to appear to present argument, the court will hear argument on behalf

of the appellant, if present. If the appellant fails to appear, the court may hear argument on behalf of the appellee, if present. If neither party appears, the case will be decided on the briefs unless the court shall otherwise order.

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Rule 39. Costs

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(c) Costs of Briefs, Appendices, and Copies of Records. By local rule the court of appeals shall fix the maximum rate at which the cost of printing or otherwise producing necessary copies of briefs, appendices, and copies of records authorized by Rule 30(f) shall be taxable. Such rate shall not be higher than that generally charged for such work in the area where the clerk's office is located and shall encourage the use of economical methods of printing and copying.

(d) Bill of Costs; Objections; Costs to be Inserted in Mandate or Added Later. A party who desires such costs to be taxed shall state them in an itemized and verified bill of costs which the party shall file with the clerk, with proof of service, within 14 days after the entry of judgment. Objections to the bill of costs must be filed within 10 days of service on the party against whom costs are to be taxed unless the time is extended by the court. The clerk shall prepare and certify an itemized statement of costs taxed in the

court of appeals for insertion in the mandate, but the issuance of the mandate shall not be delayed for taxation of costs and if the mandate has been issued before final determination of costs, the statement, or any amendment thereof, shall be added to the mandate upon request by the clerk of the court of appeals to the clerk of the district court.

* * * * *

Rule 43. Substitution of Parties

(a) Death of a Party. If a party dies after a notice of appeal is filed or while a proceeding is otherwise pending in the court of appeals, the personal representative of the deceased party may be substituted as a party on motion filed by the representative or by any party with the clerk of the court of appeals. The motion of a party shall be served upon the representative in accordance with the provisions of Rule 25. If the deceased party has no representative, any party may suggest the death on the record and proceedings shall then be had as the court of appeals may direct. If a party against whom an appeal may be taken dies after entry of a judgment or order in the district court but before a notice of appeal is filed, an appellant may proceed as if death had not occurred. After the notice of appeal is filed substitution shall be effected in the court of appeals in accordance with this subdivision. If a party entitled to appeal shall die before filing a notice of appeal, the notice of appeal may be filed by that party's personal representative, or, if there is

no personal representative by that party's attorney of record within the time prescribed by these rules. After the notice of appeal is filed substitution shall be effected in the court of appeals in accordance with this subdivision.

* * * * *

(c) Public Officers; Death or Separation from Office.

(1) When a public officer is a party to an appeal or other proceeding in the court of appeals in an official capacity and during its pendency dies, resigns or otherwise ceases to hold office, the action does not abate and the public officer's successor is automatically substituted as a party. Proceedings following the substitution shall be in the name of the substituted party, but any misnomer not affecting the substantial rights of the parties shall be disregarded. An order of substitution may be entered at any time, but the omission to enter such an order shall not affect the substitution.

(2) When a public officer is a party to an appeal or other proceeding in an official capacity that public officer may be described as a party by the public officer's official title rather than by name; but the court may require the public officer's name to be added.

Rule 45. Duties of Clerks

(a) General Provisions. The clerk of a court of appeals shall take the oath and give the bond required by law. Neither the clerk

nor any deputy clerk shall practice as an attorney or counselor in any court while continuing in office. The court of appeals shall be deemed always open for the purpose of filing any proper paper, of issuing and returning process and of making motions and orders. The office of the clerk with the clerk or a deputy in attendance shall be open during business hours on all days except Saturdays, Sundays, and legal holidays, but a court may provide by local rule or order that the office of its clerk shall be open for specified hours on Saturdays or on particular legal holidays other than New Years Day, Birthday of Martin Luther King, Jr., Washington's Birthday, Memorial Day, Independence Day, Labor Day, Columbus Day, Veterans Day, Thanksgiving Day, and Christmas Day.

(b) The Docket; Calendar; Other Records Required. The clerk shall maintain a docket in such form as may be prescribed by the Director of the Administrative Office of the United States Courts. The clerk shall enter a record of all papers filed with the clerk and all process, orders and judgments. An index of cases contained in the docket shall be maintained as prescribed by the Director of the Administrative Office of the United States Courts.

The clerk shall prepare, under the direction of the court, a calendar of cases awaiting argument. In placing cases on the calendar for argument, the clerk shall give preference to appeals in criminal cases and to appeals and other proceedings entitled to preference by law.

The clerk shall keep such other books and records as may be required from time to time by the Director of the Administrative Office of the United States Courts with the approval of the Judicial Conference of the United States, or as may be required by the court.

* * * * *

(d) Custody of Records and Papers. The clerk shall have custody of the records and papers of the court. The clerk shall not permit any original record or paper to be taken from the clerk's custody except as authorized by the orders or instructions of the court. Original papers transmitted as the record on appeal or review shall upon disposition of the case be returned to the court or agency from which they were received. The clerk shall preserve copies of briefs and appendices and other printed papers filed.

Rule 46. Attorneys

(a) Admission to the Bar of a Court of Appeals; Eligibility; Procedure for Admission. An attorney who has been admitted to practice before the Supreme Court of the United States, or the highest court of a state, or another United States court of appeals, or a United States district court (including the district courts for the Canal Zone, Guam and the Virgin Islands), and who is of good moral and professional character, is eligible for admission to the bar of a court of appeals.

An applicant shall file with the clerk of the court of appeals, on a form approved by the court and furnished by the clerk, an

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application for admission containing the applicant's personal statement showing eligibility for membership. At the foot of the application the applicant shall take and subscribe to the following oath or affirmation:

I,_____, do solemnly swear (or affirm) that I will demean myself as an attorney and counselor of this court, uprightly and according to law; and that I will support the Constitution of the United States.

Thereafter, upon written or oral motion of a member of the bar of the court, the court will act upon the application. An applicant may be admitted by oral motion in open court, but it is not necessary that the applicant appear before the court for the purpose of being admitted, unless the court shall otherwise order. An applicant shall upon admission pay to the clerk the fee prescribed by rule or order of the court.

(b) Suspension or Disbarment. When it is shown to the court that any member of its bar has been suspended or disbarred from practice in any other court of record, or has been guilty of conduct unbecoming a member of the bar of the court, the member will be subject to suspension or disbarment by the court. The member shall be afforded an opportunity to show good cause, within such time as the court shall prescribe, why the member should not be suspended or disbarred. Upon the member's response to the rule to show cause, and after hearing, if requested, or upon expiration of the time prescribed for a response if no response is made, the court shall enter an appropriate order.

**EXCERPT FROM THE
REPORT OF THE JUDICIAL CONFERENCE COMMITTEE
ON RULES OF PRACTICE AND PROCEDURE**

TO THE CHIEF JUSTICE OF THE UNITED STATES, CHAIRMAN, AND THE MEMBERS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES:

I. Federal Rules of Appellate Procedure

The Advisory Committee on the Federal Rules of Appellate Procedure has submitted to your Committee proposed new Appellate Rules 3.1, 5.1, and 15.1 and proposed amendments to Appellate Rules 19, 28(c), 30(a) and (b), 39(c), and 45(b). These proposed new rules and amendments to existing rules were circulated to the bench and bar and the public generally for comment in September, 1984, and public hearings were held in Washington, D. C., on February 1, 1985 and in San Francisco, California, on February 21, 1985. Your Committee has reviewed each proposal presented and has made certain technical and clarifying changes which in the Committee's view do not alter the substance of the proposals.

In accordance with a request from the Supreme Court your Committee also asked the Advisory Committee to eliminate all gender-specific language from the Appellate Rules. Subsequently, the Advisory Committee submitted additional proposed amendments to Appellate Rules 3(d), 8(b), 10(b) and (c), 11(b), 12(a), 23(b) and (c), 24(a), 25(a) and (b), 26(a) and (c), 28(j), 30(c), 31(a) and (c), 34(a) and (e), 39(d) 43(a) and (c), 45(a) and (d), and 46(a) and (b). These proposed amendments were not circulated for public comment since they are merely stylistic and no substantive change is intended.

The above proposed amendments to the Federal Rules of Appellate Procedure are set out in Appendix A and are accompanied by Committee Notes explaining their purpose and intent. A separate report from the Chairman of the Advisory Committee summarizes the Advisory Committee's work.

Your Committee recommends that these proposed amendments be approved by the Conference and transmitted to the Supreme Court for its consideration with a recommendation that they be approved by the Court and transmitted to the Congress pursuant to law.

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
OF THE
JUDICIAL CONFERENCE OF THE UNITED STATES
ADMINISTRATIVE OFFICE OF THE
UNITED STATES COURTS
WASHINGTON, D. C. 20544

TO THE COMMITTEE ON RULES OF PRACTICE AND PROCEDURE:

On April 23, 1985, the Advisory Committee on the Federal Appellate Rules met in Washington, D. C. to consider the comments of the bench and bar on the preliminary drafts of amendments to the Federal Rules of Appellate Procedure which had been submitted for public comment on September 6, 1984.

The Advisory Committee considered the statements made at the public hearings conducted in Washington, D. C. on February 1, 1985 and in San Francisco, California on February 21, 1985 as well as the written statements submitted by interested individuals and groups. The following paragraphs present a summary of those statements and the Advisory Committee's recommendation with respect to each preliminary draft.

Rule 3.1

A. Summary of Public Comment

The Association of the Bar of the City of New York, Committee on Federal Courts, suggests that the word "consent" be used in place of "stipulate" (line 1) and "agree" (line 5) in order to conform the language of the rule to 28 U.S.C. § 636(c) (1) and (c)(3). The Association also suggests a comma after "district court" (line 6) and to change "and thereafter" in line 6 to "which is thereafter reviewable."

The Board of Trustees of the Los Angeles County Bar Association and the Philadelphia Bar Association note their agreement with the preliminary draft.

B. Advisory Committee Recommendations

The Advisory Committee, after reviewing the comments of the bench and bar, recommends the following changes in the language of the preliminary draft:

line 1 - Change "stipulate" to "consent."

line 5 - Change "agree" to "consent."

This change conforms the language of the rule to the precise language of the statute.

Rule 5.1

A. Summary of Public Comment

While several bar associations approved of the preliminary draft, the majority of the commentators suggested that the seven day period for the filing of an answer in opposition was too short. One commentator also suggested that specific allowance for cross petitions be made.

B. Advisory Committee Recommendations

The Advisory Committee, after reviewing the comments of the bench and bar, recommends the following changes in the language of the preliminary draft:

line 1 - Change "The" to "An" and add two commas in lines 2 and 4.

These changes are purely stylistic.

line 11 - Change "seven" to "14."

This change is prompted by the concern of several who submitted statements that seven days was too short a period. The change to arabic numbers is purely stylistic.

line 12 - Add: "or a cross-petition."

This change, also suggested by a comment from the bar, will ensure that, once a petition is filed, other parties may suggest other reasons for further review of the case by the court of appeals.

line 26 - Change "ten" to "10.

This change is purely stylistic.

Rule 15.1

A. Summary of Public Comment

Only one comment was received on this proposed rule. The Philadelphia Bar Association recommends against adoption unless the rule is expanded to include enforcement proceedings other than those brought by the NLRB.

B. Advisory Committee Recommendations

The Advisory Committee recommends no changes in the language of the preliminary draft.

Rule 19

A. Summary of Public Comment

The Association of the Bar of the City of New York suggests the elimination of the language "or denied completely such enforcement" in the Committee Note. It suggests the following language be added:

> "The simpler procedures permitted by this change already are applicable when the court's opinion denies completely the enforcement of an agency's order."

Several other bar associations and the Ninth Circuit Advisory Commmittee indicated their agreement with the preliminary draft or stated that they had no objection.

B. Advisory Committee Recommendations

The Advisory Committee recommends no changes in the language of the preliminary draft or of the Committee Note except stylistic changes in lines 6 and 8.

Rule 28

A. Summary of Public Comment

Several commentaries expressed approval of the preliminary draft. The Ninth Circuit Advisory Committee suggested that the new rule be limited to briefs over 3-4 pages. The Los Angeles Chapter of the Federal Bar Association suggests that the draft read:

"The reply briefs shall conform to the requirements of subdivision (a)(1)."

B. Advisory Committee Recommendations

The Advisory Committee recommends no changes in the language of the preliminary draft. The matters raised by the comments of the bench and bar were considered prior to the circulation of the preliminary draft. The Advisory Committee believes that the rule should provide the practitioner with guidance without reference to another subsection. It also believes that the requirement should extend to all reply briefs regardless of their length.

Rule 30(a)

A. Summary of Public Comment

Several commentators expressed agreement with the preliminary draft. The Joint Federal Courts Committee of the Bar Association of San Francisco suggested that the rule, and not just the Committee Note, should state that only pertinent sections of memoranda should be included.

B. Advisory Committee Recommendations

The Advisory Committee recommends no changes in the language of the preliminary draft except a stylistic change in line 15.

Rule 30(b)

A. Summary of Public Comment

This preliminary draft has been opposed by all those who did comment on it. The objections can be summarized as follows:

1. Present mechanisms for the allocation of costs provide adequate sanctions.

2. Courts already have the power to sanction attorneys acting in bad faith.

3. The preliminary draft fails to specify criteria for bad faith and fails to require use of procedural safeguards before imposition of sanctions.

4. Imposition of sanctions would be expensive and time consuming.

5. The preliminary draft amendment deals with only a small portion of the frivolous appeal problem.

6. Education of the bar would be the more appropriate approach.

B. Advisory Committee Recommendations

The Advisory Committee recomends only stylistic changes to the preliminary draft. On the basis of its study of the practice under Rule 30, as set forth in the report submitted to this Committee in July 1984, the Advisory Committee believes that the preliminary draft is an appropriate response. It recommends the following addition to the Committee Note:

> "The local rule shall provide for notice and opportunity to respond before imposition of any sanction."

Rule 39(c)

A. Summary of Public Comment

The Board of Trustees of the Los Angeles County Bar Association expressed "no major opposition" to the preliminary draft. The Association of the Bar of the City of New York expessed doubt as to the proposed rule's efficacy. The Philadelphia Bar Association recommends against adoption on the ground that the rule will not reduce the overall costs of litigation. John L. Warden, Esquire of the New York Bar suggests that the rule specifically permit standard typographic printing.

B. Advisory Committee Recommendations

The Advisory Committee recommends no change in the preliminary draft.

Rule 45

A. Summary of Public Comment

Several commentators expressed approval of or no opposition to the preliminary draft. The Joint Federal Courts Committee of the Bar Association of San Francisco recommends clarification to assure that the clerk of court enter a record of all papers filed in the clerk's office and that these papers remain available to the public.

B. Advisory Committee Recommendations

The Advisory Committee recommends no changes in the preliminary draft except a stylistic change in line 24. The suggestion set forth above is not within the scope of the rule, and, in the opinion of the Advisory Committee, unnecessary.

Stylistic Changes

The Advisory Commiteee was requested to remove gender-specific language from all appellate rules. Amendments to many rules were required and the changes requested are included.

Respectfully submitted,

Pierce Lively
Chairman, Advisory Committee on the Federal Appellate Rules

June 10, 1985

APPENDIX A

PROPOSED AMENDMENTS TO THE FEDERAL RULES OF APPELLATE PROCEDURE*

Rule 3. Appeal as of Right - How Taken

* * * * *

(d) Service of the Notice of Appeal. The clerk of the district court shall serve notice of the filing of a notice of appeal by mailing a copy thereof to counsel of record of each party other than the appellant, or, if a party is not represented by counsel, to the ~~party at his~~ last known address of that party; and the clerk shall transmit forthwith a copy of the notice of appeal and of the docket entries to the clerk of the court of appeals named in the notice. When an appeal is taken by a defendant in a criminal case, the clerk shall also serve a copy of the notice of appeal upon ~~him~~ the defendant, either by personal service or by mail addressed to ~~him~~ the defendant. The clerk shall note on each copy served the date on which the notice of appeal was filed. Failure of the clerk to serve notice shall not affect the validity of the appeal. Service shall be sufficient notwithstanding the death of a party or ~~his~~ the party's counsel. The

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*New matter is underlined; matter to be omitted is lined through.

clerk shall note in the docket the names of the parties to whom he the clerk mails copies, with the date of mailing.

* * * * *

COMMITTEE NOTE

The amendments to Rule 3(d) are technical. No substantive change is intended.

Rule 3.1. Appeals from Judgments Entered by Magistrates in Civil Cases

When the parties consent to a trial before a magistrate pursuant to 28 U.S.C. § 636(c) (1), an appeal from a judgment entered upon the direction of a magistrate shall be heard by the court of appeals pursuant to 28 U.S.C. § 636(c) (3), unless the parties, in accordance with 28 U.S.C. § 636(c) (4), consent to an appeal on the record to a judge of the district court and thereafter, by petition only, to the court of appeals. Appeals to the court of appeals pursuant to 28 U.S.C. § 636 (c) (3) shall be taken in identical fashion as appeals from other judgments of the district court.

COMMITTEE NOTE

Under the governing statute, 28 U.S.C. § 636(c) (3), the judgment of a magistrate becomes a judgment of the district court and is appealable to the court of appeals "as an appeal from any other judgment of a district court." This provision is designed to make this point explicit for the convenience of practitioners.

Rule 5.1. Appeals by Permission Under 28 U.S.C. . 636(c) (5)

(a) Petition for Leave to Appeal; Answer or Cross Petition. An appeal from a district court judgment, entered after an appeal pursuant to 28 U.S.C. . 636(c) (4) to a judge of the district court from a judgment entered upon direction of a magistrate in a civil case, may be sought by filing a petition for leave to appeal. An appeal on petition for leave to appeal is not a matter of right, but its allowance is a matter of sound judicial discretion. The petition shall be filed with the clerk of the court of appeals within the time provided by Rule 4(a) for filing a notice of appeal, with proof of service on all parties to the action in the district court. A notice of appeal need not be filed. Within 14 days after service of the petition, a party may file an answer in opposition or a cross petition.

(b) Content of Petition; Answer. The petition for leave to appeal shall contain a statement of the facts necessary to an understanding of the questions to be presented by the appeal; a statement of those questions and of the relief sought; a statement of the reasons why in the opinion of the petitioner the appeal should be allowed; and a copy of the order, decree or judgment complained of and any opinion or memorandum relating thereto. The petition and answer shall be submitted to a panel of judges of the court of appeals without oral argument unless otherwise ordered.

(c) Form of Papers; Number of Copies. All papers may be typewritten. Three copies shall be filed with the original, but the court may require that additional copies be furnished.

(d) Allowance of the Appeal; Fees; Cost Bond; Filing of Record. Within 10 days after the entry of an order granting the appeal, the appellant shall (1) pay to the clerk of the district court the fees established by statute and the docket fee prescribed by the Judicial Conference of the United States and (2) file a bond for costs if required pursuant to Rule 7. The clerk of the district court shall notify the clerk of the court of appeals of the payment of the fees. Upon receipt of such notice, the clerk of the court of appeals shall enter the appeal upon the docket. The record shall be transmitted and filed in accordance with Rules 11 and 12(b).

COMMITTEE NOTE

When the initial appeal of a magistrate's decision is taken to the district court, the statute provides for a second discretionary appeal to the court of appeals. This rule provides the procedure for taking such an appeal.

Rule 8. Stay or Injunction Pending Appeal

* * * * *

(b) Stay May Be Conditioned Upon Giving of Bond; Proceedings Against Sureties. Relief available in the court of appeals under this rule may be conditioned upon the filing of a bond

or other appropriate security in the district court. If security is given in the form of a bond or stipulation or other undertaking with one or more sureties, each surety submits ~~himself~~ to the jurisdiction of the district court and irrevocably appoints the clerk of the district court as ~~his~~ the surety's agent upon whom any papers affecting ~~his~~ the surety's liability on the bond or undertaking may be served. ~~His~~ A surety's liability may be enforced on motion in the district court without the necessity of an independent action. The motion and such notice of the motion as the district court prescribes may be served on the clerk of the district court, who shall forthwith mail copies to the sureties if their addresses are known.

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COMMITTEE NOTE

The amendments to Rule 8(b) are technical. No substantive change is intended.

Rule 10. The Record on Appeal

* * * * *

(b) The Transcript of Proceedings; Duty of Appellant to Order; Notice to Appellee if Partial Transcript is Ordered.

(1) Within 10 days after filing the notice of appeal the appellant shall order from the reporter a transcript of such parts of the proceedings not already on file as ~~he~~ the appellant deems necessary, subject to local rules of the courts of appeals. The order shall be in writing and within the same period a copy shall be filed with the clerk of the district court. If funding is to come from the United States under the Criminal Justice Act, the order shall so state. If no such parts of the proceedings are to be ordered, within the same period the appellant shall file a certificate to that effect.

(2) If the appellant intends to urge on appeal that a finding or conclusion is unsupported by the evidence or is contrary to the evidence, ~~he~~ the appellant shall include in the record a transcript of all evidence relevant to such finding or conclusion.

(3) Unless the entire transcript is to be included, the appellant shall, within the 10 days time provided in (b)(1) of this Rule 10, file a statement of the issues ~~he~~ the appellant intends to present on the appeal and shall serve on the appellee a copy of the order or certificate and of the statement. If the appellee deems a transcript or other parts of the proceedings to be necessary, ~~he~~ the appellee shall, within 10 days after the service of the order or certificate and the statement of the appellant, file and serve on the appellant a designation of additional parts to be included. Unless within 10 days after service of such designation the appellant has

ordered such parts, and has so notified the appellee, the appellee may within the following 10 days either order the parts or move in the district court for an order requiring the appellant to do so.

(4) At the time of ordering, a party must make satisfactory arrangements with the reporter for payment of the cost of the transcript.

(c) Statement on the Evidence or Proceedings When no Report Was Made or When the Transcript is Unavailable. If no report of the evidence or proceedings at a hearing or trial was made, or if a transcript is unavailable, the appellant may prepare a statement of the evidence or proceedings from the best available means, including ~~his~~ the appellant's recollection. The statement shall be served on the appellee, who may serve objections or proposed amendments thereto with 10 days after service. Thereupon the statement and any objections or proposed amendments shall be submitted to the district court for settlement and approval and as settled and approved shall be included by the clerk of the district court in the record on appeal.

* * * * *

COMMITTEE NOTE

The amendments to Rules 10(b) and (c) are technical. No substantive change is intended.

Rule 11. Transmission of the Record

* * * * *

(b) Duty of Reporter to Prepare and File Transcript; Notice to Court of Appeals; Duty of Clerk to Transmit the Record. Upon receipt of an order for a transcript, the reporter shall acknowledge at the foot of the order the fact that ~~he~~ the reporter has received it and the date on which ~~he~~ the reporter expects to have the transcript completed and shall transmit the order, so endorsed, to the clerk of the court of appeals. If the transcript cannot be completed within 30 days of receipt of the order the reporter shall request an extension of time from the clerk of the court of appeals and the action of the clerk of the court of appeals shall be entered on the docket and the parties notified. In the event of the failure of the reporter to file the transcript within the time allowed, the clerk of the court of appeals shall notify the district judge and take such other steps as may be directed by the court of appeals. Upon completion of the transcript the reporter shall file it with the clerk of the district court and shall notify the clerk of the court of appeals that ~~he~~ the reporter has done so.

When the record is complete for purposes of the appeal, the clerk of the district court shall transmit it forthwith to the clerk of the court of appeals. The clerk of the district court shall number the documents comprising the record and shall transmit with the

record a list of documents correspondingly numbered and identified with reasonable definiteness. Documents of unusual bulk or weight, physical exhibits other than documents, and such other parts of the record as the court of appeals may designate by local rule, shall not be transmitted by the clerk unless ~~he~~ the clerk is directed to do so by a party or by the clerk of the court of appeals. A party must make advance arrangements with the clerks for the transportation and receipt of exhibits of unusual bulk or weight.

* * * * *

COMMITTEE NOTE

The amendments to Rule 11(b) are technical. No substantive change is intended.

Rule 12. Docketing the Appeal; Filing of the Record

(a) Docketing the Appeal. Upon receipt of the copy of the notice of appeal and of the docket entries, transmitted by the clerk of the district court pursuant to Rule 3(d), the clerk of the court of appeals shall thereupon enter the appeal upon the docket. An appeal shall be docketed under the title given to the action in the district court, with the appellant identified as such, but if such title does not contain the name of the appellant, ~~his~~ the appellant's name, identified as appellant, shall be added to the title.

* * * * *

COMMITTEE NOTE

The amendment to Rule 12(a) is technical. No substantive change is intended.

Rule 15.1. Briefs and Oral Argument in National Labor Relations Board Proceedings

Each party adverse to the National Labor Relations Board in an enforcement or a review proceeding shall proceed first on briefing and at oral argument unless the court orders otherwise.

COMMITTEE NOTE

This rule simply confirms the existing practice in most circuits.

Rule 19. Settlement of Judgments Enforcing Orders

When an opinion of the court is filed directing the entry of a judgment enforcing ~~in whole or~~ in part the order of an agency, the agency shall within 14 days thereafter serve upon the respondent and file with the clerk a proposed judgment in conformity with the opinion. If the respondent objects to the proposed judgment as not in conformity with the opinion, ~~he~~ the respondent shall within 7 days thereafter serve upon the agency and file with the clerk a proposed judgment which ~~he~~ the respondent deems to be in conformity with the opinion. The court will thereupon settle the judgment and direct its entry without further hearing or argument.

COMMITTEE NOTE

The deletion of the words "in whole or" is designed to eliminate delay in the issuance of a judgment when the court of appeals has either enforced completely the order of an agency or denied completely such enforcement. In such a clear-cut situation, it serves no useful purpose to delay the issuance of the judgment until a proposed judgment is submitted by the agency and reviewed by the respondent. This change conforms the Rule to the existing practice in most circuits. Other amendments are technical and no substantive change is intended.

Rule 23. Custody of Prisoners in Habeas Corpus Proceedings

* * * * *

(b) Detention or Release of Prisoner Pending Review of Decision Failing to Release. Pending review of a decision failing or refusing to release a prisoner in such a proceeding, the prisoner may be detained in the custody from which release is sought, or in other appropriate custody, or may be enlarged upon ~~his~~ the prisoner's recognizance, with or without surety, as may appear fitting to the court or justice or judge rendering the decision, or to the court of appeals or to the Supreme Court, or to a judge or justice of either court.

(c) Release of Prisoner Pending Review of Decision Ordering Release. Pending review of a decision ordering the release of a prisoner in such a proceeding, the prisoner shall be enlarged upon ~~his~~ the prisoner's recognizance, with or without surety, unless the court or justice or judge rendering the decision, or the court of appeals or the Supreme Court, or a judge or justice of either court shall otherwise order.

* * * * *

COMMITTEE NOTE

The amendments to Rules 23(b) and (c) are technical. No substantive change is intended.

Rule 24. Proceedings in Forma Pauperis

(a) Leave to Proceed on Appeal in Forma Pauperis from District Court to Court of Appeals. A party to an action in a district court who desires to proceed on appeal in forma pauperis shall file in the district court a motion for leave so to proceed, together with an affidavit, showing, in the detail prescribed by Form 4 of the Appendix of Forms, ~~his~~ the party's inability to pay fees and costs or to give security therefor, ~~his~~ the party's belief that ~~he~~ that party is entitled to redress, and a statement of the issues which ~~he~~ that party intends to present on appeal. If the motion is granted, the party may proceed without further application to the court of appeals and without prepayment of fees or costs in either court or the giving of security therefor. If the motion is denied, the district court shall state in writing the reasons for the denial.

Notwithstanding the provisions of the preceding paragraph, a party who has been permitted to proceed in an action in the district court in forma pauperis, or who has been permitted to proceed there as one who is financially unable to obtain adequate defense in a criminal case, may proceed on appeal in forma pauperis without further authorization unless, before or after the notice of appeal is filed, the district court shall certify that the appeal is not taken in

good faith or shall find that the party is otherwise not entitled so to proceed, in which event the district court shall state in writing the reasons for such certification or finding.

If a motion for leave to proceed on appeal in forma pauperis is denied by the district court, or if the district court shall certify that the appeal is not taken in good faith or shall find that the party is otherwise not entitled to proceed in forma pauperis, the clerk shall forthwith serve notice of such action. A motion for leave so to proceed may be filed in the court of appeals within 30 days after service of notice of the action of the district court. The motion shall be accompanied by a copy of the affidavit filed in the district court, or by the affidavit prescribed by the first paragraph of this subdivision if no affidavit has been filed in the district court, and by a copy of the statement of reasons given by the district court for its action.

* * * * *

COMMITTEE NOTE

The amendments to Rule 24(a) are technical. No substantive change is intended.

Rule 25. Filing and Service

(a) Filing. Papers required or permitted to be filed in a court of appeals shall be filed with the clerk. Filing may be accomplished by mail addressed to the clerk, but filing shall not be timely unless the papers are received by the clerk within the time fixed for filing, except that briefs and appendices shall be deemed filed on the day of mailing if the most expeditious form of delivery by mail, excepting special delivery, is utilized. If a motion requests relief which may be granted by a single judge, the judge may permit the motion to be filed with ~~him~~ the judge, in which event ~~he~~ the judge shall note thereon the date of filing and shall thereafter transmit it to the clerk.

(b) Service of all Papers Required. Copies of all papers filed by any party and not required by these rules to be served by the clerk shall, at or before the time of filing, be served by a party or person acting for ~~him~~ that party on all other parties to the appeal or review. Service on a party represented by counsel shall be made on counsel.

* * * * *

COMMITTEE NOTE

The amendments to Rules 25(a) and (b) are technical. No substantive change is intended.

Rule 26. Computation and Extension of Time

(a) Computation of Time. In computing any period of time prescribed by these rules, by an order of court, or by any applicable statute, the day of the act, event, or default from which the designated period of time begins to run shall not be included. The last day of the period shall be included, unless it is a Saturday, a Sunday, or a legal holiday, in which event the period extends until the end of the next day which is not a Saturday, a Sunday, or a legal holiday. When the period of time prescribed or allowed is less than 7 days, intermediate Saturdays, Sundays, and legal holidays shall be excluded in the computation. As used in this rule "legal holiday" includes New Year's Day, Birthday of Martin Luther King, Jr., Washington's Birthday, Memorial Day, Independence Day, Labor Day, Columbus Day, Veterans Day, Thanksgiving Day, Christmas Day, and any other day appointed as a holiday by the President or the Congress of the United States. It shall also include a day appointed as a holiday by the state wherein the district court which rendered the judgment or order which is or may be appealed from is situated, or by the state wherein the principal office of the clerk of the court of appeals in which the appeal is pending is located.

* * * * *

(c) Additional Time after Service by Mail. Whenever a party is required or permitted to do an act within a prescribed period after service of a paper upon ~~him~~ that party and the paper is served by mail, 3 days shall be added to the prescribed period.

COMMITTEE NOTE

The Birthday of Martin Luther King, Jr. is added to the list of national holidays in Rule 26(a). The amendment to Rule 26(c) is technical. No substantive change is intended.

Rule 28. Briefs

* * * * *

(c) Reply Brief. The appellant may file a brief in reply to the brief of the appellee, and if the appellee has cross-appealed, the appellee may file a brief in reply to the response of the appellant to the issues presented by the cross appeal. No further briefs may be filed except with leave of court. All reply briefs shall contain a table of contents, with page references, and a table of cases (alphabetically arranged), statutes and other authorities cited, with references to the pages of the reply brief where they are cited.

* * * * *

(j) Citation of Supplemental Authorities. When pertinent and significant authorities come to the attention of a party after ~~his~~ the

party's brief has been filed, or after oral argument but before decision, a party may promptly advise the clerk of the court, by letter, with a copy to all counsel, setting forth the citations. There shall be a reference either to the page of the brief or to a point argued orally to which the citations pertain, but the letter shall without argument state the reasons for the supplemental citations. Any response shall be made promptly and shall be similarly limited.

COMMITTEE NOTE

While Rule 28(g) can be read as requiring that tables of authorities be included in a reply brief, such tables are often not included. Their absence impedes efficient use of the reply brief to ascertain the appellant's reponse to a particular argument of the appellee or to the appellee's use of a particular authority. The amendment to Rule 28(c) is intended to make it clear that such tables are required in reply briefs.

The amendment to Rule 28(j) is technical. No substantive change is intended.

Rule 30. Appendix to the Briefs

(a) Duty of Appellant To Prepare and File; Content of Appendix; Time for Filing; Number of Copies. The appellant shall prepare and file an appendix to the briefs which shall contain: (1) the relevant docket entries in the proceeding below; (2) any relevant portions of the pleadings, charge, findings or opinion; (3) the judgment, order or decision in question; and (4) any other parts of the record to which the parties wish to direct the particular attention of the court. Except where they have independent relevance, memoranda of law in the district court should not be

included in the appendix. The fact that parts of the record are not included in the appendix shall not prevent the parties or the court from relying on such parts.

Unless filing is to be deferred pursuant to the provisions of subdivision (c) of this rule, the appellant shall serve and file the appendix with ~~his~~ the brief. Ten copies of the appendix shall be filed with the clerk, and one copy shall be served on counsel for each party separately represented, unless the court shall by rule or order direct the filing or service of a lesser number.

(b) Determination of Contents of Appendix; Cost of Producing. The parties are encouraged to agree as to the contents of the appendix. In the absence of agreement, the appellant shall, not later than 10 days after the date on which the record is filed, serve on the appellee a designation of the parts of the record which ~~he~~ the appellant intends to include in the appendix and a statement of the issues which ~~he~~ the appellant intends to present for review. If the appellee deems it necessary to direct the particular attention of the court to parts of the record not designated by the appellant, ~~he~~ the appellee shall, within 10 days after receipt of the designation, serve upon the appellant a designation of those parts. The appellant shall include in the appendix the parts thus designated. In designating parts of the record for inclusion in the appendix, the parties shall have regard for the fact that the entire record is

always available to the court for reference and examination and shall not engage in unnecessary designation.

Unless the parties otherwise agree, the cost of producing the appendix shall initially be paid by the appellant, but if the appellant considers that parts of the record designated by the appellee for inclusion are unnecessary for the determination of the issues presented he the appellant may so advise the appellee and the appellee shall advance the cost of including such parts. The cost of producing the appendix shall be taxed as costs in the case, but if either party shall cause matters to be included in the appendix unnecessarily the court may impose the cost of producing such parts on the party. Each circuit shall provide by local rule for the imposition of sanctions against attorneys who unreasonably and vexatiously increase the costs of litigation through the inclusion of unnecessary material in the appendix.

(c) Alternative Method of Designating Contents of the Appendix; How References to the Record May be Made in the Briefs When Alternative Method is Used. If the court shall so provide by rule for classes of cases or by order in specific cases, preparation of the appendix may be deferred until after the briefs have been filed, and the appendix may be filed 21 days after service of the brief of the appellee. If the preparation and filing of the appendix is thus deferred, the provisions of subdivision (b) of this Rule 30 shall apply,

except that the designations referred to therein shall be made by each party at the time ~~his~~ each brief is served, and a statement of the issues presented shall be unnecessary.

If the deferred appendix authorized by this subdivision is employed, references in the briefs to the record may be to the pages of the parts of the record involved, in which event the original paging of each part of the record shall be indicated in the appendix by placing in brackets the number of each page at the place in the appendix where that page begins. Or if a party desires to refer in ~~his~~ a brief directly to pages of the appendix, ~~he~~ that party may serve and file typewritten or page proof copies of ~~his~~ the brief within the time required by Rule 31(a), with appropriate references to the pages of the parts of the record involved. In that event, within 14 days after the appendix is filed ~~he~~ the party shall serve and file copies of the brief in the form prescribed by Rule 32(a) containing references to the pages of the appendix in place of or in addition to the initial references to the pages of the parts of the record involved. No other changes may be made in the brief as initially served and filed, except that typographical errors may be corrected.

* * * * *

COMMITTEE NOTE

Subdivision (a). During its study of the separate appendix [see Report of the Advisory Committee on the Federal Appellate Rules on the Operation of Rule 30, _ FRD _ (1985)], the Advisory Committee found that this document was frequently encumbered with memoranda submitted to

the trial court. United States v. Noall, 587 F.2d 123, 125 n. 1 (2nd Cir. 1978). See generally Drewett v. Aetna Cas. & Sur. Co., 539 F.2d 496, 500 (5th Cir. 1976); Volkswagenwerk Aktiengesellschaft v. Church, 413 F.2d 1126, 1128 (9th Cir. 1969). Inclusion of such material makes the appendix more bulky and therefore less useful to the appellate panel. It also can increase significantly the costs of litigation.

There are occasions when such trial court memoranda have independent relevance in the appellate litigation. For instance, there may be a dispute as to whether a particular point was raised or whether a concession was made in the district court. In such circumstances, it is appropriate to include pertinent sections of such memoranda in the appendix.

Subdivision (b). The amendment to subdivision (b) is designed to require the circuits, by local rule, to establish a procedural mechanism for the imposition of sanctions against those attorneys who conduct appellate litigation in bad faith. Both 28 U.S.C. § 1927 and the inherent power of the court authorize such sanctions. See Brennan v. Local 357, International Brotherhood of Teamsters, 709 F.2d 611 (9th Cir. 1983). See generally Roadway Express, Inc. v. Piper, 447 U.S. 752 (1980). While considerations of uniformity are important and doubtless will be taken into account by the judges of the respective circuits, the Advisory Committee believes that, at this time, the circuits need the flexibility to tailor their approach to the conditions of local practice. The local rule shall provide for notice and opportunity to respond before the imposition of any sanction.

Technical amendments also are made to subdivisions (a), (b) and (c) which are not intended to be substantive changes.

Rule 31. Filing and Service of Briefs

(a) Time for Serving and Filing Briefs. The appellant shall serve and file ~~his~~ a brief within 40 days after the date on which the record is filed. The appellee shall serve and file ~~his~~ a brief within 30 days after service of the brief of the appellant. The appellant may serve and file a reply brief within 14 days after service of the brief of the appellee, but, except for good cause shown, a reply brief must be filed at least 3 days before argument. If a court of appeals is prepared to consider cases on the merits promptly after briefs are

filed, and its practice is to do so, it may shorten the periods prescribed above for serving and filing briefs, either by rule for all cases or for classes of cases, or by order for specific cases.

* * * * *

(c) Consequence of Failure to File Briefs. If an appellant fails to file ~~his~~ a brief within the time provided by this rule, or within the time as extended, an appellee may move for dismissal of the appeal. If an appellee fails to file ~~his~~ a brief, ~~he~~ the appellee will not be heard at oral argument except by permission of the court.

COMMITTEE NOTE

The amendments to Rules 31(a) and (c) are technical. No substantive change is intended.

Rule 34. Oral Argument

(a) In General; Local Rule. Oral argument shall be allowed in all cases unless pursuant to local rule a panel of three judges, after examination of the briefs and record, shall be unanimously of the opinion that oral argument is not needed. Any such local rule shall provide any party with an opportunity to file a statement setting forth the reasons why~~, in his opinion,~~ oral argument should be heard. A general statement of the criteria employed in the administration of such local rule shall be published in or with the

rule and such criteria shall conform substantially to the following minimum standard:

Oral Argument will be allowed unless

(1) the appeal is frivolous; or

(2) the dispositive issue or set of issues has been recently authoritatively decided; or

(3) the facts and legal arguments are adequately presented in the briefs and record and the decisional process would not be significantly aided by oral argument.

* * * * *

(e) Non-Appearance of Parties. If the appellee fails to appear to present argument, the court will hear argument on behalf of the appellant, if present. If the appellant fails to appear, the court may hear argument on behalf of the appellee, if ~~his counsel is~~ present. If neither party appears, the case will be decided on the briefs unless the court shall otherwise order.

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COMMITTEE NOTE

The amendments to Rules 34(a) and (e) are technical. No substantive change is intended.

Rule 39. Costs

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(c) Costs of Briefs, Appendices, and Copies of Records. ~~Unless otherwise provided by local rule, the cost of printing, or otherwise producing necessary copies of briefs, appendices, and copies of records authorized by Rule 30(f) shall be taxable in the court of appeals at rates not higher than those generally charged for such work in the area where the clerk's office is located.~~ By local rule the court of appeals shall fix the maximum rate at which the cost of printing or otherwise producing necessary copies of briefs, appendices, and copies of records authorized by Rule 30(f) shall be taxable. Such rate shall not be higher than that generally charged for such work in the area where the clerk's office is located and shall encourage the use of economical methods of printing and copying.

(d) Bill of Costs; Objections; Costs to be Inserted in Mandate or Added Later. A party who desires such costs to be taxed shall state them in an itemized and verified bill of costs which ~~he~~ the party shall file with the clerk, with proof of service, within 14 days after the entry of judgment. Objections to the bill of costs must be filed within 10 days of service on the party against whom costs are to be taxed unless the time is extended by the court. The clerk shall

prepare and certify an itemized statement of costs taxed in the court of appeals for insertion in the mandate, but the issuance of the mandate shall not be delayed for taxation of costs and if the mandate has been issued before final determination of costs, the statement, or any amendment thereof, shall be added to the mandate upon request by the clerk of the court of appeals to the clerk of the district court.

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COMMITTEE NOTE

The amendment to subdivison (c) is intended to increase the degree of control exercised by the courts of appeals over rates for printing and copying recoverable as costs. It further requires the courts of appeals to encourage cost-consciousness by requiring that, in fixing the rate, the court consider the most economical methods of printing and copying.

The amendment to subdivision (d) is technical. No substantive change is intended.

Rule 43. Substitution of Parties

(a) Death of a Party. If a party dies after a notice of appeal is filed or while a proceeding is otherwise pending in the court of appeals, the personal representative of the deceased party may be substituted as a party on motion filed by the representative or by any party with the clerk of the court of appeals. The motion of a party shall be served upon the representative in accordance with the provisions of Rule 25. If the deceased party has no representative,

any party may suggest the death on the record and proceedings shall then be had as the court of appeals may direct. If a party against whom an appeal may be taken dies after entry of a judgment or order in the district court but before a notice of appeal is filed, an appellant may proceed as if death had not occurred. After the notice of appeal is filed substitution shall be effected in the court of appeals in accordance with this subdivision. If a party entitled to appeal shall die before filing a notice of appeal, the notice of appeal may be filed by ~~his~~ that party's personal representative, or, if ~~he has~~ there is no personal representative by ~~his~~ that party's attorney of record within the time prescribed by these rules. After the notice of appeal is filed substitution shall be effected in the court of appeals in accordance with this subdivision.

* * * * *

(c) Public Officers; Death or Separation from Office.

(1) When a public officer is a party to an appeal or other proceeding in the court of appeals in ~~his~~ an official capacity and during its pendency dies, resigns or otherwise ceases to hold office, the action does not abate and ~~his~~ the public officer's successor is automatically substituted as a party. Proceedings following the substitution shall be in the name of the substituted party, but any misnomer not affecting the substantial rights of the parties shall be disregarded. An order of substitution may be entered at any time, but the omission to enter such an order shall not affect the substitution.

(2) When a public officer is a party to an appeal or other proceeding in ~~his~~ an official capacity ~~he~~ that public officer may be described as a party by ~~his~~ the public officer's official title rather than by name; but the court may require ~~his~~ the public officer's name to be added.

COMMITTEE NOTE

The amendments to Rules 43(a) and (c) are technical. No substantive change is intended.

Rule 45. Duties of Clerks

(a) General Provisions. The clerk of a court of appeals shall take the oath and give the bond required by law. Neither the clerk nor any deputy clerk shall practice as an attorney or counselor in any court while ~~he continues~~ continuing in office. The court of appeals shall be deemed always open for the purpose of filing any proper paper, of issuing and returning process and of making motions and orders. The office of the clerk with the clerk or a deputy in attendance shall be open during business hours on all days except Saturdays, Sundays, and legal holidays, but a court may provide by local rule or order that the office of its clerk shall be open for specified hours on Saturdays or on particular legal holidays other than New Years Day, Birthday of Martin Luther King, Jr., Washington's Birthday, Memorial Day, Independence Day, Labor

Day, Columbus Day, Veterans Day, Thanksgiving Day, and Christmas Day.

(b) The Docket; Calendar; Other Records Required. ~~The clerk shall keep a book, known as the docket, in such form and style as may be prescribed by the Director of the Administrative Office of the United States Courts with the approval of the Judicial Conference of the United States, and shall enter therein each case. Cases shall be assigned consecutive file numbers. The file number of each case shall be noted on the folio of the docket whereon the first entry is made. All papers filed with the clerk and all process, orders and judgment shall be entered chronologically in the docket on the folio assigned to the case. Entries shall be brief but shall show the nature of each paper filed or judgment or order entered. The entry of an order or judgment shall show the date the entry is made. The clerk shall keep a suitable index of cases contained in the docket.~~

The clerk shall maintain a docket in such form as may be prescribed by the Director of the Administrative Office of the United States Courts. The clerk shall enter a record of all papers filed with the clerk and all process, orders and judgments. An index of cases contained in the docket shall be maintained as prescribed by the Director of the Administrative Office of the United States Courts.

The clerk shall prepare, under the direction of the court, a calendar of cases awaiting argument. In placing cases on the calendar for argument, he the clerk shall give preference to appeals in criminal cases and to appeals and other proceedings entitled to preference by law.

The clerk shall keep such other books and records as may be required from time to time by the Director of the Administrative Office of the United States Courts with the approval of the Judicial Conference of the United States, or as may be required by the court.

* * * * *

(d) Custody of Records and Papers. The clerk shall have custody of the records and papers of the court. He The clerk shall not permit any original record or paper to be taken from ~~his~~ the clerk's custody except as authorized by the orders or instructions of the court. Original papers transmitted as the record on appeal or review shall upon disposition of the case be returned to the court or agency from which they were received. The clerk shall preserve copies of briefs and appendices and other printed papers filed.

COMMITTEE NOTE

The amendment to Rule 45(b) permits the courts of appeals to maintain computerized dockets. The Committee believes that the

Administrative Office of the United States Courts ought to have maximum flexibility in prescribing the format of this docket in order to ensure a smooth transition from manual to automated systems and subsequent adaptation to technological improvements.

The amendments to Rules 45(a) and (d) are technical. No substantive change is intended. The Birthday of Martin Luther King, Jr. has been added to the list of national holidays.

Rule 46. Attorneys

(a) Admission to the Bar of a Court of Appeals; Eligibility; Procedure for Admission. An attorney who has been admitted to practice before the Supreme Court of the United States, or the highest court of a state, or another United States court of appeals, or a United States district court (including the district courts for the Canal Zone, Guam and the Virgin Islands), and who is of good moral and professional character, is eligible for admission to the bar of a court of appeals.

An applicant shall file with the clerk of the court of appeals, on a form approved by the court and furnished by the clerk, an application for admission containing ~~his~~ the applicant's personal statement showing ~~his~~ eligibility for membership. At the foot of the application the applicant shall take and subscribe to the following oath or affirmation:

I,_____, do solemnly swear (or affirm) that I will demean myself as an attorney and counselor of this court, uprightly and according to law; and that I will support the Constitution of the United States.

Thereafter, upon written or oral motion of a member of the bar of the court, the court will act upon the application. An applicant may be admitted by oral motion in open court, but it is not necessary that ~~he~~ the applicant appear before the court for the purpose of being admitted, unless the court shall otherwise order. An applicant shall upon admission pay to the clerk the fee prescribed by rule or order of the court.

(b) Suspension or disbarment. When it is shown to the court that any member of its bar has been suspended or disbarred from practice in any other court of record, or has been guilty of conduct unbecoming a member of the bar of the court, ~~he~~ the member will be subject to suspension or disbarment by the court. The member shall be afforded an opportunity to show good cause, within such time as the court shall prescribe, why ~~he~~ the member should not be suspended or disbarred. Upon ~~his~~ the member's response to the rule to show cause, and after hearing, if requested, or upon expiration of the time prescribed for a response if no response is made, the court shall enter an appropriate order.

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COMMITTEE NOTE

The amendments to Rules 46(a) and (b) are technical. No substantive change is intended.

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